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In The

Supreme Court of the United States

October Term, 1977

No. 77-645

DER-RONG CHOUR,

Petitioner,

vs.

BENEDICT J. FERRO, District Director, Immigration and Naturalization Service, Buffalo, New York, Or Any Other Person Having The Said Petitioner In His Custody; IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Preliminary Statement 1

A. General Considerations 1

B. Proceedings Below 2

Question Presented 3

Statement of the Facts 4

A. The Deportation Hearing Transcripts 4

1. Two Transcripts and the Transcriber's Explanation 4

2. The Misstatement of the Right to Retain Counsel Glossed as "Slight Discrepancies" and "Indisputable Waivers" 6

a. The materially contradictory sections 6

b. The misstatement of the right to counsel . 7

c. The manipulation of the two transcripts . 8

B. The Wholesale Failure to Advise Petitioner of His Rights 9

C. The "Admissions" of the Petitioner 10

D. Failure to Advise Petitioner of Right to Appeal . 11

Contents

Page

E. Petitioner's Applications for Determination of Eligibility to Adjust Status from Nonimmigrant Crewman 12

Argument:

I. The Second Circuit has sanctioned stripping petitioner of every regulatory, statutory and procedural safeguard promulgated by the INS in marked conflict with the decisions of this Court and marked conflict with decisions of every circuit court which has ruled on deprivations of rights far less extreme than the instant case. 13

A. "Due Process" As Applied to Aliens and Deportation Hearings Generally 13

B. What Does Due Process Require — General Considerations 15

C. The Absence of Clear Communication of Right to Retain Counsel and Wholesale De Facto Repeal of Every Regulatory Safeguard Violates Due Process. 16

1. Factual Landscape Compared to Other Cases. 16

2. The Regulations Are the "Sole" and "Exclusive" Procedure for Determining Deportability and "Assuring" the Rights of Petitioner. 18

3. Failing to Keep One Accurate Record Works Invidious Discrimination on Petitioner and Violates Due Process. 21

Contents

Page

4. Failing to Advise Petitioner of His Right to Retain Counsel Violated Due Process.. 22

5. Right to Appointed Counsel and the Conflict in the Circuit Courts 24

a. The fallacy of a "prejudice rule" ... 25

b. Plain prejudice is on the record 25

D. Petitioner's Right to Adjust His Status 26

Conclusion 27

TABLE OF CITATIONS

Cases Cited:

Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed 681 (1954) 20

Argersinger v. Hamlin, 407 U.S. 25 (1975) 25

Ballenilla-Gonzalez v. INS, 546 F.2d 515 (1976) 24

Barthold v. INS, 517 F.2d 689 (5th Cir. 1975) 14, 17, 23, 25

Board of Regents v. Roth, 408 U.S. 564 (1972) 15

Bridges v. Wixon, 326 U.S. 136 (1945) 14, 15

Burquez v. INS, 513 F.2d 751 (10th Cir. 1975) 14, 18, 25

Carnley v. Cochran, 369 U.S. 506 (1962) 23

Page

Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975) 14, 23, 24

Cheng Fan Kwok v. INS, 392 U.S. 206 (1970) 16, 19, 22

Chlomos v. INS, 516 F.2d 310 (3d Cir. 1975) 14, 25

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 15

Glasser v. United States, 315 U.S. 60 (1942) 23

Goldberg v. Kelly, 397 U.S. 254 (1970) 15

Goss v. Lopez, 419 U.S. 565 (1974) 15

Griffin v. Illinois, 351 U.S. 12 (1951) 6, 22

Hupart v. Bd. of Higher Ed. of City of New York, 420 F. . Supp. 1087 (S.D.N.Y. 1976) 20

Mathews v. Diaz, 426 U.S. 67 (1976) 14

Miranda v. Arizona, 384 U.S. 436 (1966) 23

Morrissey v. Brewer, 408 U.S. 471 (1972) 15

Ramirez v. INS, 550 F.2d 560 (9th Cir. 1977) 14

Robert E. Hampton, Ch'm'n, United States Civil Service Comm., et al. v. Mow Sun Wong, 426 U.S. 88 (1976) .. 14

The Japanese Immigrant Case, 189 U.S. 86 (1902) 13

Page

Tupacyupanqui-Marin v. INS, 447 F.2d 603 (7th Cir. 1971) 17

United States v. Gasca-Kraft, 522 F.2d 149 (4th Cir. 1975) 14

United States v. Shaughnessy, 347 U.S. 260 (1953) 19

Wong Wing v. United States, 163 U.S. 228 (1896) 22

Woodby v. INS, 385 U.S. 276 (1967) 15

Yick Wu v. Hopkins, 118 U.S. 356 (1886) 22

Statutes Cited:

8 U.S.C. §1153(a)(2) 12

8 U.S.C. §1153(a)(7) 13

8 U.S.C. §1252(b) 19

8 U.S.C. §1255 .....26, 27

8 U.S.C. §1255(a) 27

United States Constitution Cited:

Fifth Amendment 4

Rule Cited:

Rules of Supreme Court, Rule 22 3

Contents

Page

Other Authorities Cited:

8 C.F.R. 242 18

8 C.F.R. 242.14(a) 15

8 C.F.R. 242.15 5

8 C.F.R. 242.16(a) 7, 9

8 C.F.R. 242.19(b) 11

APPENDIX

Deportation Order 1a

Order of United States District Court 3a

Decision of Board of Immigration Appeals Dated July 14, 1977 ..... 5a

Decision of United States Court of Appeals Dated October 12, 1977 ..... 8a

Letter and Order Dated October 19, 1977 ..... 10a

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

A. General Considerations

The panel of Hons. J. Joseph Smith, Walter R. Mansfield and James L. Oakes have sounded the death knell for procedural due process for thousands of aliens subject to deportation hearings, in callous disregard of petitioner's rights and this Court's prior holdings.

If allowed to stand, this decision will set a nationwide precedent for deporting aliens *never before subject to deportation* without a semblance of due process, using procedures bearing no resemblance to those mandated by statute and regulation, depriving untold numbers of aliens of their opportunity to adjust their status from nonimmigrant crewman, an opportunity kept open as a matter of administrative policy to date. By singling out petitioner and depriving him alone of this long established privilege, at the very least the panel has given respondents *carte blanche* to ignore every procedural safeguard promulgated to preserve fundamental fairness in deporting any given alien.

Cavalierly dismissing the appeal below, motion to reconsider said dismissal, motion to stay and motion to stay the deportation mandate pending submission of the appeal for writ of certiorari, necessitating a motion being prepared and being submitted within thirty-six hours, the panel even deprived petitioner of his right to effectually file a reply brief by refusing to postpone oral argument from October 12, 1977. This was only seven days after petitioner received the answering brief of respondents on October 5, 1977, three of which days the court was closed.

That the Second Circuit characterized the present record from the bench as one in which "all rights were given" is, with all due respect, shocking. The District Court itself, while dismissing the habeas corpus petition on jurisdictional grounds, listed a litany of regulation violations.

B. Proceedings Below

A motion to stay deportation pending this application was made necessary by petitioner's imminent deportation. The motion was made to stay deportation of Der-rong Chour pending application for writ of cetiorari following the denial[1] of

1. The denial was communicated telephonically to the office of counsel for petitioner at approximately 2:30 p.m., October 18, 1977, a copy of which denial is, therefore, not attached hereto.

petitioner's motion to recall the warrant for deportation[2] which warrant issued on October 13, 1977, ordering petitioner's deportation on October 19, 1977, at 1:51 p.m. from Buffalo International Airport.[3] A copy of the warrant was received by petitioner and petitioner's counsel on October 17, 1977.[4] The motion to recall was made on the grounds that the deportation being scheduled for October 19, 1977, left insufficient time to prepare and file the petition for writ of certiorari pursuant to Rule 22, Rules of the Supreme Court, United States, to review the dismissal by the Second Circuit on October 12, 1977,[5] of petitioner's appeal from the District Court's denial of a writ of habeas corpus[6] and the Second Circuit's dismissal of petitioner's appeal from the decision of July 14, 1977 of the Board of Immigration Appeals to deny petitioner's application to reopen the deportation proceedings.[7] Petitioner had been ordered deported after a deportation hearing on September 4, 1974.

QUESTION PRESENTED

Whether petitioner, a non-English-speaking alien who presently has two applications pending to adjust his status to that of permanent resident, was denied due process of law under

2. A copy of petitioner's motion to recall the deportation mandate filed in the Second Circuit Court of Appeals on October 17, 1977, is attached hereto, *infra*.

3. A copy of the deportation order is attached as an exhibit to the motion to recall referenced at n.2, *supra*.

4. Date received is stamped on warrant. *See*, n.3, *supra*.

5. A copy of the October 12, 1977, decision is attached hereto, *infra*.

6. A copy of the petition for writ of habeas corpus is attached hereto, *infra*.

7. A copy of the July 14, 1977, decision of the Board of Immigration Appeals dismissing the application to reopen is attached hereto, *infra*.

the Fifth Amendment to the United States Constitution at his deportation hearing by the (1) failure of the Immigration Judge to inform him of his statutory right to retain counsel, which failure to inform itself violated Immigration and Naturalization Service (hereinafter "INS") regulation; (2) the failure of the Immigration Judge to inform him of his statutory right to have a reasonable opportunity to examine and object to the evidence and object to evidence against him, which failure to inform itself violated INS regulation; (3) failure of the Immigration Judge to inform petitioner of his statutory right to present evidence on his own behalf and to cross-examine Government witnesses, which failure to inform itself violated INS regulation; (4) the production and prejudicial manipulation of two materially contradictory transcripts of the deportation hearing by the Immigration and Naturalization Service; (5) the failure of the INS to maintain one accurate transcript of the deportation proceeding in violation of regulation; (6) the deportation hearing judge's failure to abide any semblance of normal evidentiary rule; (7) the failure to provide petitioner with counsel at the deportation hearing.

STATEMENT OF THE FACTS

A. The Deportation Hearing Transcripts

1. Two Transcripts and the Transcriber's Explanation

The petitioner was subjected to a deportation proceeding without benefit of counsel on September 4, 1974. A copy of two transcripts of the hearing were provided to petitioner at the habeas corpus hearing of June 29, 1977.

The transcriber accounted for the two transcripts and their contradictions in an affidavit provided the Circuit Court in support of the INS opposing petitioner's initial motion for release on bond pending appeal to the Second Circuit[8] and motion for

8. Movant was arrested at his place of employment on June 6, 1977, and continuously incarcerated and subject to imminent deportation until July 19, 1977.

stay of deportation pending determination of the appeal to the Second Circuit. The affidavit, dated July 1, 1977, states as follows:

> "My name is Sylvia Davis. I am a dictaphone machine transcriber for Immigration and Naturalization Service for one year and four months. On June 20, 1977 I transcribed the hearing record in the deportation hearing of CHOUR, Der Rong. That my certified record of hearing was forwarded by mail to Immigration and Naturalization Service in Buffalo, New York. On June 23, 1977, four days later, I was again requested to transcribe the deportation hearing of Mr. Chour because I was told that the original transcript had not been received by the Buffalo office. The slight discrepancies between the two transcriptions were the result of interfering sounds on the belt which made some words difficult to immediately understand."

The "discrepancies" are thus laid to a defective or misused recording "belt".

A possible material contravention of INS Regulation is thus initially evidenced, as 8 C.F.R. 242.15 provides:

> "§242.15 Contents of record.
>
> The hearing before the special inquiry officer, including the testimony, exhibits, applications and requests, the special inquiry officer's decision, and all written orders, motions, appeals, brief, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with

> the permission of the special inquiry officer. In his discretion, the special inquiry officer may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief."

As will be discussed below, this potentially material violation raises questions of constitutional dimension reached before by this Court where indigent appellants were totally deprived of a transcript working invidious discrimination upon such appellant.[9]

2. The Misstatement of the Right to Retain Counsel Glossed as "Slight Discrepancies" and "Indisputable Waivers"

a. The materially contradictory sections

The portions of the major discrepancies in the two transcripts are as follows:

> "Q. You have a right to have a lawyer or other authorized representative of your own selection but without cost to the government. However, you are not required, you are *not authorized* to have such a person, you can go ahead without one and speak for yourself as you prefer. What will you do about having or not have [sic] such a person? A. I will speak for myself."

The copy submitted by respondents to Judge Port at the habeas corpus hearing, however, substituted the words "not forced" for "not authorized." Both copies had been certified as correct by INS transcribers.

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9. *See Griffin v. Illinois*, 351 U.S. 12 (1951).

b. The misstatement of the right to counsel

The INS Regulations specifically require that the right to retain counsel be succinctly expressed to a deportee at the hearing. 8 C.F.R. 242.16(a) provides in pertinent part as follows:

> "§242.16 Hearing.
>
> (a) *Opening.* The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation."

Materially contradictory transcripts cannot be glossed in light of this regulation as "substantially correct" nor magically transformed into reflecting an appraisal of rights which never occurred. The INS chose in their Statement of Facts, for example (Respondents' Brief, p. 3 *et seq.*) to ignore the material contradictions by divining that District Court Judge Port "concluded" that petitioner was aware of his right to retain counsel "irrespective of which transcript is correct" (Respondents' Brief, p. 6, n. 9) and further chose to buttress their divinations by references to private conversations presumably between an Assistant United States Attorney and an interpreter that the transcripts are "substantially correct" (references in patent violation of any appellate court's rules which limit litigants to a record) (*id.*).

Any claim that petitioner's *response* to the Immigration Judge's garbled expression of petitioner's right to retain counsel is "undisputed" (Respondents' Brief, p. 6, n. 9) and that somehow the "indisputability" of the response to the garbled expression of the right transmutes to the indisputability of the

Judge's initial expression of petitioner's right to retain counsel is tenuous.

Petitioner's "indisputable" response to the garbled expression of his right to retain counsel uses the very syntax that the Judge used in presenting the misstatement of the law to him, potentially confirming petitioner's misunderstanding of the rights which were his. The Judge said, in essence, in one transcript, that there is generally a right to retain counsel, but "*you* are not authorized to have such a person [an attorney], *you* can go ahead without one and *speak for yourself.*" (emphasis supplied). Petitioner, *using the same language and syntax,* responded, *"I will speak for myself."*

The only "indisputable" alternatives thus presented to petitioner were to proceed without counsel, as he was not "authorized" to have one, but, nevertheless, to "speak for himself," or, in the alternative, to proceed without an attorney and say nothing. (To posit that this exchange constitutes a "knowledgeable, intelligent or voluntary waiver" is denied on a factual basis and legally unjustified as is discussed below.)

c. The manipulation of the two transcripts

As may be seen from the transcript of the hearing before Judge Port at page 18, the respondents had served on petitioner a copy of the INS hearing which differed from the one they served on the court. In the copy of the INS hearing served upon petitioner, a portion thereof read:

> ". . . you are not authorized to have such a person [an attorney], you can go ahead without one and speak for yourself as you prefer."

The copy submitted by respondents to Judge Port, however, substituted the words "not forced" for "not authorized." Both copies had been certified as correct by INS transcribers.

B. The Wholesale Failure to Advise Petitioner of His Rights

Judge Port of the District Court found that the transcripts reflected the following with respect to rights required by regulation to be given orally at the hearing to the alien:

> "I see no place in the transcript where the petitioner was advised that he would have a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf and to cross-examine witnesses by the government."

Regulation 8 C.F.R. 242.16(a) provides:

> "§242.16 Hearing.
>
> (a) *Opening.* The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government; placed the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in non-technical language."

Whether the transcripts reflect advising petitioner of his right to retain counsel has been previously discussed.

Judge Port thus found the proceedings statutorily defective, while denying the writ on jurisdictional grounds.

C. The "Admissions" of the Petitioner

The Board of Immigration Appeals found the above regulatory violations excusable "in view of the fact that the finding of deportability was based upon his [petitioner's] own admissions."

The actual finding of the Immigration Judge was a judgment in printed form, which has in it a printed section which reads: "Upon the basis of respondent's admissions. . .", signalling the frequency of such "admissions."

Turning to the transcripts themselves, the "admission" is as follows:

TRANSCRIPT ONE:

"Q. At that time were you allowed to enter this country temporarily as a crewman, permitted to stay no longer than 29 days? A. Yes.

Q. However, did you stay in this country longer than that time without permission from Immigration? A. Right.

Q. Because of that do you admit now that the government has the right to deport you? A. Yes.

Q. Do you want to be deported or do you want to leave on your own. We call that voluntary departure."

TRANSCRIPT TWO:

"Q. At that time were you allowed to enter the country temporarily as a crewman to stay no longer than 29 days. Is that true? A. Yes.

Q. However, did you stay in this country beyond that time without permission from Immigration? A. Yes.

Q. Because of that do you admit that the Government now has the right to deport you? A. Yes.

Q. Do you want to be deported or will you leave on your own. We call that voluntary departure."

These "admissions" as to the law of deportation under federal statute, regulation and pertinent case law are, of course, coming from a Chinese-speaking layman with no training in the law. This "admission," predictably, is totally inaccurate. As will be demonstrated below, nonimmigrant crewmen *with knowledgeable* attorneys, never even reach a deportation hearing and adjust their status in a matter of months if a "preference" is applicable, *as in the present case.* The constitutional requirements with respect to providing counsel in light of the education attainment of petitioner and the complexity of the issues will also be discussed below.

D. Failure to Advise Petitioner of Right to Appeal

The transcript of the original deportation hearing reveals that the petitioner's rights were further violated in that *he was never advised of his right to appeal the decision of the Immigration Judge.* 8 C.F.R. 242.19(b), in pertinent part, specifically requires:

> *"Unless appeal from the decision is waived, the respondent shall be furnished with Notice of Appeal, Form 1-290A, and advised of the provisions of §242.21.* A typewritten copy of the oral decision shall be furnished at the request of the respondent or the trial attorney."

Petitioner was *never advised of his right* to appeal, *never waived his right* to appeal (having no knowledge of the opportunity available to him), and thereby suffered further "hardship" by the lack of such advice.

E. Petitioner's Applications for Determination of Eligibility to Adjust Status from Nonimmigrant Crewman

On September 28, 1977, petitioner submitted two packages of forms and supporting documents to the New York office of the INS, both of which were accepted for processing by that office. Applications of these types are sufficient in themselves to stay deportation proceedings in the New York office of the INS, pending their disposition.

The papers submitted were: a "Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa" (form I-130), which is directed "to the Secretary of State" and includes the explicit notation that petitioner will apply to the American Consulate in Montreal, Canada for the visa, the pertinence of which will be discussed, *infra*, with regard to the normal re-entry procedures for crewmen; petitioner's Marriage Certificate verifying that petitioner's spouse is a resident alien, rendering petitioner eligible for a "second preference" in accordance with 8 U.S.C. §1153(a)(2) which provides:

> "(2) Visas shall next be made available, in a number not to exceed 20 per centum of the number specified in section 1151(a)(ii) of this title, plus any visas not required for the classes specified in paragraph (1) of this subsection, to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence."

These documents were submitted on September 28, 1977, and were accepted for processing on September 30, 1977 by the

INS, as is verified by the return receipt signed by the "I-130" section of the INS.

Similarly, the INS has accepted the I-539 application of petitioner and is processing it to determine petitioner's "refugee" status[10] in accordance with 8 U.S.C. §1153(a)(7).

ARGUMENT

I.

THE SECOND CIRCUIT HAS SANCTIONED STRIPPING PETITIONER OF EVERY REGULATORY, STATUTORY AND PROCEDURAL SAFEGUARD PROMULGATED BY THE INS IN MARKED CONFLICT WITH THE DECISIONS OF THIS COURT AND MARKED CONFLICT WITH DECISIONS OF EVERY CIRCUIT COURT WHICH HAS RULED ON DEPRIVATIONS OF RIGHTS FAR LESS EXTREME THAN THE INSTANT CASE.

A. "Due Process" As Applied to Aliens and Deportation Hearings Generally

Seventy-five years ago Justice Harlan stated that "this Court has never held, nor must we now be understood as holding that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law'". *The Japanese Immigrant Case*, 189 U.S. 86 (1902).

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10. Petitioner was evacuated from Ta-Chen Island, off the coast of Chekiang Province, China, under control of the Communists since 1955. His evacuation was in part at the behest of the American military authorities, rendering his return "seriously suspect" in the eyes of the People's Republic of China officials and rendering petitioner's subject to "thought reform" and imprisonment.

Where procedural due process for aliens is challenged, the Supreme Court remains vigorous in its protection:

> "Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection [cit. omitted]. . . that protects every one of these persons [aliens] from deprivation of life, liberty, or property without due process of law. [cit. omitted]" *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). *See also, Robert E. Hampton, Ch'm'n. United States Civil Service Comm., et al. v. Mow Sun Wong*, 426 U.S. 88 (1976).

Thus, it has never been questioned that "an alien subjected to deportation proceedings is entitled to due process of law. [cit. omitted]" *Chlomos v. INS*, 516 F.2d 310 (3d Cir. 1975). *See also, Burquez v. INS*, 513 F.2d 751 (10th Cir. 1975); *Barthold v. INS*, 517 F.2d 689 (5th Cir. 1975); *Castaneda-Delgado v. INS*, 525 F.2d 1295 (7th Cir. 1975); *Ramirez v. INS*, 550 F.2d 560 (9th Cir. 1977); *United States v. Gasca-Kraft*, 522 F.2d 149 (4th Cir. 1975).

Instructive in the inquiry as to what procedural safeguards are constitutionally necessary at deportation hearings is *Bridges v. Wixon*, 326 U.S. 136 (1945).

> "We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceedings, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. *Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the*

> *essential standards of fairness.*" 326 U.S., *at* 154. (emphasis supplied).

This Court has held that essential standards of fairness require that deportability be proven by "clear, unequivocal and convincing evidence"[11] in light of the "drastic deprivation" of deportation. *Woodby v. INS*, 385 U.S. 276, 285 (1967).

B. What Does Due Process Require—General Considerations

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The issues properly framed are the "educational attainment" of a deportee, *see, Goldberg v. Kelly*, 397 U.S. 254, 268 (1970), the need for skill in evaluating the complexity of the rights at stake, *see, Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973), the "nature" of the liberty or property interest in question, *see, Goss v. Lopez*, 419 U.S. 565, 575-576 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972), and a resultant decision as to how best to balance the factors.

Initially, it is submitted that the "nature" of the right at stake at a deportation hearing is of paramount importance.

This Court has termed deportation "a great hardship", *Bridges v. Wixon, supra*, at 154, and a "drastic deprivation". *Woodby v. INS*, 385 U.S. 276, 285 (1967).

Secondly, the "educational attainment" of a non-English-speaking alien with respect to knowledge of deportation law must be deemed at least as lacking as a parolee or probation violator's knowledge of the criminal law defined in his own language, in his own country.

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11. This evidentiary standard is now found in 8 C.F.R. 242.14(a) *sufficiency*.

More significantly, this Court's compilation of the litany of administrative and judicial procedures attendant the deportation process is an eloquent argument for the meaninglessness of a deportation procedure being carefully structured to protect rights of aliens when those aliens are allowed to wander aimlessly through the maze without the aid of counsel. *See, Cheng Fan Kwok v. INS*, 392 U.S. 206, 208-210 (1970).[12]

This is nowhere better illustrated than the instant case where presence of counsel would have avoided the deportation hearing entirely.

C. The Absence of Clear Communication of Right to Retain Counsel and Wholesale De Facto Repeal of Every Regulatory Safeguard Violates Due Process.

1. Factual Landscape Compared to Other Cases.

A good example of a record in which the regulations were followed aptly dramatizes the factual issues herein which must form the basis for the legal arguments.

> "[3] At Barthold's deportation hearing the following colloquy occurred:
>
> Q. You have the right to be represented by an attorney at this hearing, if you want, or you can go ahead if you do not choose to be represented. Do you want to be represented by a lawyer? A. Can the Government give me an attorney?
>
> Q. No, the Government cannot provide an attorney for you in these cases because we are

12. Citing only one example, is it even possible than an alien will know that "a suspension of deportation 'must be requested prior to or during the deportation hearing.'"? *Cheng Fan Kwok*, at 216.

> prohibited by law from doing so. It must be an attorney at your own expense. However, *if you do not have the money to afford an attorney, I can adjourn the case and give you the opportunity to contact Legal Services to see whether or not they will provide an attorney for you.* Do you have — you say you do not have sufficient money to pay for an attorney? A. No, Sir.
>
> Q. Well, do you want the opportinity [sic] to call Legal Services to see if they will provide you with an attorney? A. I will continue without an attorney.
>
> Q. Very well. If at any time during the course of the proceedings you feel that you are unable to represent any more or that you think an attorney's answer will be necessary, just let me know and I will adjourn the case to still give you a chance to get one. You understand that you will have this continuing right until the case is completed? A. Yes. (Emphasis added.)" *Barthold v. INS, supra.*

The inadequacy of the present record need hardly be emphasized when compared to the above record.

Another dramatic illustration is *Tupacyupanqui-Marin v. INS*, 447 F.2d 603, 605 (7th Cir. 1971):

> "The special inquiry officer explained the nature and purpose of the show cause order and of the hearing. Petitioner stated that he understood. Petitioner was then advised that he had the right to be represented by counsel of his own choice at no expense to the Government and was asked

> whether he wished to obtain one or to proceed without an attorney. He answered that he wished to proceed without counsel.
>
> Petitioner was then advised that he should immediately object whenever he felt something was unfair or not right. He was further advised that he had the right to examine all evidence against him and to present evidence on his own behalf."

The trial judge in *Burquez v. INS*, 513 F.2d 751 (10th Cir. 1975) stated in simple expository style: "You have a right to be represented by an attorney by any person authorized to practice in these proceedings. Do you understand." [Answer] "Yes."

In this case the judge explained the right to counsel and then *explained it away* on one transcript as not "authorized" and not "forced" on another. In plain English, on one transcript, the judge told petitioner that there was generally a right to counsel, but not for Der-rong Chour, petitioner.

Telling petitioner what he was not "forced" *or* "authorized" to do is a far cry from simply informing him of what he *could* do and *had a right* to do. If the rights in 8 C.F.R. 242 were all given by informing a deportee that he is not "forced" to be present, or "forced" to have a record, the regulatory scheme would quickly be swept entirely under the rug in favor of *sub rosa* proceedings bearing little resemblance to the procedural plans contemplated by the framers of the regulations, *which is exactly what has occurred in this case.*

2. The Regulations Are the "Sole" and "Exclusive" Procedure for Determining Deportability and "Assuring" the Rights of Petitioner.

Not only are the regulations statutorily styled "the *sole* and

exclusive procedure for determining. . . deportability. . .", 8 U.S.C. §1252(b), (emphasis added), but this Court states that the regulations "assure" fairness:

> "It is useful first to summarize the relevant provisions of the Immigration and Nationality Act and of the regulations promulgated under the Act's authority. Section *242(b) provides a detailed administrative procedure for determining whether an alien may be deported. It permits the entry of an order of deportation *only upon the basis of a record* made in a proceeding before a special inquiry officer, at which the alien is *assured rights to counsel, to a reasonable opportunity to examine the evidence against him, to cross-examine witnesses, and to present evidence in his own behalf.*" *Cheng Fan Kwok v. INS*, 392 U.S. 206, 208-9 (1968) (emphasis supplied).

In *United States v. Shaughnessy*, 347 U.S. 260 (1953), where the deportability of an alien was all but a foregone conclusion, Justice Clark reversed the affirmation of the deportation order of this same Second Circuit on the sole grounds that the regulations for suspending deportation proceedings were not followed.

> *"Regulations. . . with the force and effect of law. . . supplement the bare bones of §19(c).* The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation." 347 U.S., at 265.

The Court then explicated the result of ignoring the regulations which have "the force and effect of law."

"Of course, he may be unable to prove his

allegation before the District Court; but he is entitled to the opportunity to try. *If successful, he may still fail to convince the Board of the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.*

Reversed." 347 U.S., at 267.

This Court thus summarily equated violations of INS regulations by the INS as violative of due process.

The failure of the INS to follow its own administrative rules and regulations herein similarly violates due process.

The rule of *Accardi* was recently invoked in *Hupart v. Bd. of Higher Ed. of City of New York*, 420 F. Supp. 1087, 1107 (S.D.N.Y. 1976), wherein the Court (per Frankel, D.J.) stated:

"It is by now familiar law that an agency's violation of its own regulations may in and of itself constitute a violation of due process. *See, e.g., Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970); *Sangamon Valley Television Corp. v. United States*, 106 U.S. App. D.C. 30, 269 F.2d 221 (1959). 'An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.' *United States v. Heffner*, 420 F.2d 809, 811 (411 Cir. 1969). Such deviations 'cannot be reconciled with the fundamental principle that ours is a government of laws, not men.' *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968).

The sweep of the doctrine is broad. Its applicability does not turn upon the formality of the embodiment of the pertinent policy. *See, e.g., United States v. Heffner, supra*, 420 F.2d at 812 (IRS instructions); *Smith v. Resor*, 406 F.2d 141, 143-44 n.2, 146 (2d Cir. 1969) (Army newsletter); *Sangamon Valley Television Corp. v. United States*, 374 U.S. 109, 116-17, 83 S.Ct. 1828, 10 L.Ed. 2d 778 (1963) (prior congressional behavior). This is so because the same 'danger of inconsistent treatment also exists when an agency departs from an unpublished rule or informal practice.' Note, Violations by Agencies of Their Own Regulations, 87 *Harv. L. Rev.* 629, 636 (1974). *See also, United States v. Heffner, supra*, 420 F.2d at 812. It is also irrelevant that the policy may be 'more generous than the Constitution requires.' *United States v. Heffner, supra. See also, Service v. Dulles*, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed. 2d 1403 (1959)."

There exists here no reason why this wise and just rule should not be applied. Petitioner was deprived of almost, if not every, right granted by statute or rule to persons in his position, and as a result he is currently unjustly subject to deportation at his hearing.

3. Failing to Keep One Accurate Record Works Invidious Discrimination on Petitioner and Violates Due Process.

The transcriber's sworn statement establishes that the recording tape belt, which should have recorded the events of the deportation hearing is garbled.

"The slight discrepancies . . . were the result of *interfering sounds on the belt* . . . " (emphasis supplied).

The qualification that this "interference" only made "immediate" understanding "difficult" is belied by the material contradictions which have remained for four months unresolved. The failure to "immediately understand" is thus an "immediacy" of four months time to date.

Where *one* alien is singled out and deprived of a record for appeal for no rational reason, whether it be poverty or, in this case, administrative inefficiency, invidious discrimination has occurred. *Griffin v. Illinois,* 351 U.S. 12 (1951). Aliens have never been exempt from this constitutional protection. *Wong Wing v. U.S.,* 163 U.S. 228 (1896); *Yick Wu v. Hopkins,* 118 U.S. 356 (1886).

Petitioner has thus effectively been denied a transcript. The tape is garbled and his appeal was reduced to a guessing game as to what occurred at the deportation hearing, although both transcripts plainly fail to reflect a succinctly informing of petitioner of his rights supposedly "assured" by regulation. *Chen Fan Kwok, supra,* at 209. He has been unconstitutionally singled out and his appeal efforts hampered, all in the face of statutues and regulations which state that deportation hearings can "only" occur upon a record, language stressed by this Court in *Cheng Fan Kwok, supra,* at 208-9.

The discrimination visited upon this petitioner is no less invidious than that which indigent defendants suffered before *Griffin.* It is not in accordance with rudimentary notions of "fair play" to force petitioner to pick his way through contradictory transcripts and be subjected to INS extra-judicial conversations with interpreters as to the accuracy of a record whose very inaccuracy violates clear statutory and regulatory mandates.

4. Failing to Advise Petitioner of His Right to Retain Counsel Violated Due Process.

The Seventh Circuit has explicitly held that failing to allow

a continuance to permit a deportee to retain counsel violates due process. *Castaneda-Delgado v. INS, supra.*

It follows, *a fortiori,* from *Castaneda-Delgado,* that failing to clearly advise petitioners of the right to retain counsel at all violates due process.

The Fifth Circuit has specifically stated that failing to advise a deportee of his right to counsel violates due process while finding a clear waiver on the particular record before them. *Barthold v. INS, supra,* at 691:

> "Lack of counsel in this case does not constitute a denial of due process, because Barthold *was offered* an opportunity to obtain counsel he could afford." *Barthold v. INS, supra,* 691.

As has been stated, in this case the Judge explained the right to counsel and then *explained it away* on one transcript as not "authorized" and not "forced" on another. The Judge thus told petitioner that there was generally a right to counsel, but for petitioner.

It seems hardly necessary to assert that the instant record thus patently fails to reflect the "knowing, voluntary and intelligent" relinquishment of the right.

> "Presuming waiver [of the right to counsel in criminal proceedings] from a silent record is impermissible." *Carnley v. Cochran,* 369 U.S. 506, 516 (1962); *see, Miranda v. Arizona,* 384 U.S. 436, 444, 467-477 (1966).

To contend waiver from this record where the record is not only not "silent", but where the Judge at one point said there was no right at all, would seem totally insupportable. *See also, Glasser v. United States,* 315 U.S. 60 (1942).

The Second Circuit in *Ballenilla-Gonzalez v. INS*, 546 F.2d 515 (1976) specifically stated that absent a clear waiver of the right to retain counsel, the constitutionality of the failure to inform a deportee of the right to retain counsel must be "reached", although the court found a waiver in that case.

> "To reach the question of the extent of petitioner's statutory and constitutional rights to counsel, however, we would have to find that she did not herself waive any such rights. This we cannot do. As required by 8 C.F.R. §242.16, the Special Inquiry Officer informed petitioner of her right to counsel at no expense to the government and asked her whether she wished to proceed with or without a lawyer. Petitioner was undecided but, believing that she could not be deported since she had given birth to an American child, ultimately decided that she would proceed without one. Thus she clearly *waived any right to a lawyer*, albeit on a mistaken impression of the law. *We are not prepared to state that every waiver of a right to counsel given under a misapprehension of the state of the law must be upheld as valid.*"

It is petitioner's contention that the Immigration Judge's garbled expression of his right to retain counsel, at one point being explicitly told he had no such right, was a fundamental breach of those notions that "inhere" in due process.

5. Right to Appointed Counsel and the Conflict in the Circuit Courts

Except for the Seventh Circuit which has held the right to counsel too fundamental to be circumscribed by a harmless error rule, *Castaneda-Delgado v. INS, supra*, some Courts of Appeals have held that absent a showing of prejudice there is no

constitutional defect in not providing counsel at a deportation hearing, although some have found such prejudice and reversed. *Compare, Chlomos v. INS, supra,* (prejudice found), and *Henriquez v. INS, supra,* (no prejudice found). Some have reserved ruling on the more fundamental question of whether prejudice is a relevant consideration. *See, Barthold v. INS, supra.*

a. The fallacy of a "prejudice rule"

The fallacy which inheres in applying a harmless error criteria to a right as fundamental as that to counsel is well illustrated herein. The instant petitioner would never have been subjected to a deportation hearing had he been accompanied by experienced counsel from the inception.

b. Plain prejudice is on the record.

As has been previously discussed, petitioner's incompetent "admissions" which no attorney at law would have allowed his client to "admit" formed the sole basis for the Board of Immigration Appeals' denial of the motion to reopen in spite of the regulation violations.

In addition, as a consequence of the initial finding of the Immigration Judge, petitioner was imprisoned from June 6, 1977 (Administrative Record, 96) until July 19, 1977. Imprisonment is not only "prejudice", its mere possibility is sufficient to make the right to counsel constitutionally mandated at criminal proceedings. *Argersinger v. Hamlin,* 407 U.S. 25, 37 (1975). Further, the Fifth Circuit specifically noted that Barthold was not incarcerated and would not be incarcerated in declining to reach the constitutional necessity of counsel at a deportation hearing in *Barthold v. INS,* 517 F.2d 689, 692. Analogously, the prejudice of imprisonment cannot be ignored.

Of greater significance, the Fifth Circuit noted that

Barthold himself argued that his return to Haiti would result in persecution (at 690). The present petitioner, ignorant of his refugee status, failed to inform the Immigration Judge that he would be subject to thought reform and imprisonment, were he returned to his home island of Ta-Chen, from which he was flown by American military authorities prior to the Communist takeover in 1955.

D. Petitioner's Right to Adjust His Status

Alien crewmen have adjusted their status to that of nonimmigrant persons admitted for permanent residence by processing applications for preference on whatever grounds are relevant through the Immigration and Naturalization Service in New York. After a favorable adjudication on *eligibility* to adjust status in the United States, the adjusting occurs *outside the United States at an American Embassy or Consulate either in his home country, or in Canada.*

An I-485 form is sent to a consulate, normally Canada, with the petitioner for adjustment of status as approved by the New York INS office. The crewman then goes to the consulate, the consulate gives him a visa, and the resident card is issued by the Canadian Consul while petitioner is in Canada, or by mail upon his return to the United States. This recognized and customary procedure does not violate federal law.

The confusion fostered below stems from a casual reading of 8 U.S.C. §1255 and ignorance of INS policy to accept the documents such as those described above for evaluation for eligibility for status change. Such an act of evaluation *is not* an act of actual adjustment.

8 U.S.C. §1255 nowhere provides that an alien crewman is prohibited from adjusting his status, and indeed, respondents are at this very moment evaluating petitioner's eligibility for such adjustment.

8 U.S.C. §1255 provides:

> "The status of an alien, other than an alien crewman, who was inspected and admitted or paroled in the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe . . . " 8 U.S.C. §1255(a).

Such practice is recognized in the New York INS office and stays of deportation proceedings pending the adjustment of status are routinely granted to crewmen. The issue of constitutional dimension is the failure to date to transfer the petitioner's file to the New York office for treatment in accordance with the above procedures.

CONCLUSION

For these reasons, the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

s/ David C. Buxbaum
Attorney for Petitioner

APPENDIX

DEPORTATION ORDER

File No. A15 196 857

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In Deportation Proceedings Under Section 242
of the Immigration and Nationality Act

DECISION OF THE IMMIGRATION JUDGE

In the Matter of CHOUR, DER RONG

Respondent.

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before October 4, 1974 or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the

Deportation Order

United States to the Republic of China on Taiwan on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to Hong Kong.

Copy of this decision has been served on respondent.

Appeal: Waived

Date: Sept. 4, 1974

Place: New York, N.Y.

s/ E.P. Emanuel
(Immigration Judge)

FINAL ORDER
SEP 4 1974
s/ E.S.

ORDER OF UNITED STATES DISTRICT COURT
(Filed June 29,1977)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel. DER-RONG CHOUR,

Petitioner,

vs.

BENEDICT J. FERRO, District Director,
IMMIGRATION AND NATURALIZATION SERVICE,
BUFFALO, NEW YORK, OR ANY OTHER PERSON
HAVING THE SAID PETITIONER IN HIS CUSTODY
IMMIGRATION AND NATURALIZATION SERVICE,

*Respondents.*APPEARANCES:

DAVID C. BUXBAUM, ESQ.
11 Broadway, Suite 1612
New York, New York 10004
Attorney for Petitioner

PAUL V. FRENCH
United States Attorney
Federal Building
Albany, New York 12201
Attorney for Respondents

EDMUND PORT, Judge

GUSTAVE J. DiBIANCO
Assistant U.S. Attorney
Of Counsel

Order of United States District Court
(Filed June 29, 1977)

ORDER

The above-entitled matter having come on to be heard before this court on the return date of an order to show cause on June 29, 1977 at Auburn, New York and the parties having stipulated upon the record that neither side had any oral evidence to present and that the matter should be decided upon the papers before the court and the court having heard the argument of the parties and having dictated its decision on the record, it is

ORDERED, that the petition for a writ of habeas corpus be and the same hereby is denied in all respects, and it is further

ORDERED, that the restriction on the removal of the petitioner from the Northern District of New York contained in said order to show cause be continued for a period of ten days, as amended by stipulation of the parties staying his removal from the State of New York instead of the Northern District of New York, and it is further

ORDERED, that the application for the release of the petitioner upon such conditions as the court deems proper, pending further proceedings, be and it hereby is denied.

s/ Edmund Post
Senior U.S. District Judge

Dated: June 29, 1977
Auburn, New York

I certify that this is a true copy.

Attest: June 29, 1977

Order of United States District Court
(Filed June 29, 1977)

J.R. SCULLY
Clerk, U.S. District Court

By: s/ James K. Evans
Deputy

DECISION OF BOARD OF IMMIGRATION APPEALS DATED JULY 14, 1977

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

July 14, 1977

File: A15 196 857 — Buffalo

In re: DER-RONG *CHOUR*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
David C. Buxbaum, Esquire
11 Broadway, Suite 1612
New York, New York 10004

ON BEHALF OF I&N SERVICE:
Leonard Leopold
Trial Attorney

CHARGE:
Order:

Decision of Board of Immigration Appeals Dated July 14, 1977

Sec. 241(a)(2), I&N Act (8 U.S.C. 125l(a)(2)) — Nonimmigrant crewman — remained longer

APPLICATION: Reopening

This is an appeal from a decision of an immigration judge dated June 27, 1977 denying the respondent's motion to reopen the proceedings against him. The respondent's appeal will be dismissed.

The respondent is a 30-year-old native and citizen of China. He was admitted to the United States at Baltimore, Maryland on February 10, 1974 as a nonimmigrant crewman authorized to remain in the United States for a period not to exceed 29 days. He has remained in the United States beyond his authorized period of stay.

In a decision dated September 4, 1974, the respondent was found deportable by an immigration judge and was granted the privilege of voluntary departure to be effected not later than October 4, 1974. The respondent did not depart by that date.

The respondent's motion to the immigration judge requested the reopening of the proceedings against him, basically, on the ground that he was denied due process of law at the time of the September 4, 1974 hearing.

The respondent has not made a showing that reopening of these proceedings is warranted.

Although the respondent was not represented by an attorney at the September 4, 1974 hearing, we are convinced that he effectively waived his right to counsel at the hearing. See *Barthold v. INS*, 517 F.2d 689 (5 Cir. 1975); *Tupacyupanqui-Marin v. INS*, 447 F.2d 603 (7 Cir. 1971). Although the

Decision of Board of Immigration Appeals Dated July 14, 1977

respondent was not then advised of his right to cross-examine witnesses against him as required by the regulations, in view of the fact that the finding of deportability was based upon his own admissions at the hearing and he was granted the only discretionary relief available to him, the error was harmless. We are satisfied that the conduct of the September 4, 1974 hearing was not of such a nature as to vitiate the finding of deportability. See *Mealha v. Shaughnessey*, 219 F.2d 600 (2 Cir. 1955).

The appeal will be dismissed.

ORDER:The appeal is dismissed.

Chairman

DECISION OF UNITED STATES COURT OF APPEALS DATED OCTOBER 12, 1977

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of October, one thousand nine hundred and seventy-seven.

Present:

HON. J. JOSEPH SMITH

HON. WALTER R. MANSFIELD

HON. JAMES L. OAKES

Circuit Judges.

Der-Rong-Chour,

Petitioner-Appellant,

v.

Benedict J. Ferro, District Director, Immigration and Naturalization Service, Buffalo, New York, Or any Other Person, Having The Said Petitioner In His Custody, Immigration and Naturalization Service,

Respondents-Appellees.

77-2074
77-4136

Decision of United States Court of Appeals Dated October 12, 1977

A petition for review of an order of the Board of Immigration Appeals.

This cause came to be heard on the record of the Immigration and Naturalization Service and was argued by counsel.

Upon consideration thereof, it is now hereby ordered, adjudged and decreed that the petition for review be and it hereby is denied.

It is further ordered, adjudged and decreed that the order of the United States District Court for the Northern District of New York be and it hereby is affirmed with costs to be taxed against the petitioner-appellant.

A. DANIEL FUSARO,

Clerk

By ARTHUR HELLER,
Deputy Clerk

LETTER AND ORDER DATED OCTOBER 19, 1977

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

October 19, 1977

David C. Buxbaum, Esquire
11 Broadway, Suite 1612
New York, New York 10004

Re: Der-Rong Chour v. Benedict J. Ferro, District Director, INS, et al., A-358

Dear Mr. Buxbaum:

Enclosed is a certified copy of the order signed on October 19, 1977 by Mr. Justice Marshall in the above-entitled case staying the deportation of Der-Rong Chour.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson
Deputy Clerk

th
Enc.

cc: Hon. Wade H. McCree, Jr.
Solicitor General of the United States
(copy of order hand-delivered)

Letter and Order Dated October 19, 1977

Clerk, U.S. Court of Appeals
for the Second Circuit (Your Nos. 77-2074, 77-4136)

Clerk, U.S. District Court for the
Northern District of New York

(with copies of the order)

SUPREME COURT OF THE UNITED STATES

No. A-358

DER-RONG CHOUR,

Petitoner,

v.

BENEDICT J. FERRO, District Director, Immigration and Naturalization Service, Buffalo, New York, Or Any Other Person Having The Said Petitioner In His Custody; IMMIGRATION AND NATURALIZATION SERVICE

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that deportation of Der-Rong Chour be, and the same is hereby, stayed pending the filing of a response to the application for stay and further order of the undersigned.

s/ Thurgood Marshall
CIRCUIT JUSTICE

Letter and Order Dated October 19, 1977

Dated this 19th

day of October, 1977

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
By Francis J. Lorson
Deputy